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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 218.

WILLIAM A. ZEH, ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,

Petitioners,

vs.

AEROGLIDE CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Statement of the Case.

Petitioners are directors and officers of Suffolk Farmers Cooperative Association, Inc., which purchased machinery from respondent under several contracts of conditional sale. While a balance of $13,302.51 remained unpaid, the Cooperative mortgaged the machinery to a bank. The conditional sales contracts, although unfiled, remained valid as between the original parties.* The mortgage to a

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* *Stewart & Co. v. Rivara* (1927) 274 U. S. 614, affirming *Rivara v. Stewart & Co.* (1925) 241 N. Y. 259.

purchaser for value without notice, however, extinguished respondent's title (§ 65, New York Personal Property Law) and constituted a conversion.* Petitioners do not now dispute that the giving of the mortgage was a conversion of the machinery. The only matter remaining in controversy is whether petitioners, all of whom as directors voted to give the mortgage, and two of whom, Zeh and Krupski, executed it, are personally liable for the conversion.

The facts are adequately stated both in the findings of the District Court [R. a16-20]** and of the Court of Appeals [App. 1a-6a].

Reasons for Denying Certiorari.

1. This Court will not disturb the decision of the Court of Appeals upon a question of state law.

2. The law of conversion is well defined in New York and amply supports the decision below.

3. The alleged conflict between panels of the Court of Appeals is illusory and based upon a misreading of *Armour* v. *Celic*.***

4. The question posed does not fairly arise upon the record.

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* *Rodney Hunt Machine Co.* v. *Stewart* (3d Dept. 1890) 57 Hun. 545.

** The references adopted in the petition (p. 2) will be used herein.

*** 294 F. 2d 432.

ARGUMENT.

POINT I.

This Court will not disturb the decision of the Court of Appeals upon a question of State Law.

Jurisdiction was founded upon diversity and, hence, the question was purely one of local law.

In the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon, and is measured by the law of the place where the tort occurred. *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.* (1949) 336 U. S. 386, 396. In the case of conversion, it is where the conversion occurred. *Salimoff & Co.* v. *Standard Oil Co.* (1933) 262 N. Y. 220. The Court of Appeals treated the question as one of New York law [App. 4a].

The general policy of this Court is to leave undisturbed a holding of the Court of Appeals on a question of state law. *Estate of Spiegel* v. *Commissioner of Internal Revenue* (1949) 335 U. S. 701, 708. This Court does not reexamine the local law as applied by the lower courts. *Skelly Oil Co.* v. *Phillips Co.* (1950) 339 U. S. 667, 674. It is particularly loath to do so where, as here, the Court of Appeals and the District Court are in agreement as to the local law. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants* (Opinion of Brennan, J. in Chambers, 1959) 4 L. Ed. 2d 30, 80 Sup. Ct. 16.

POINT II.

The law of conversion is well defined in New York and amply supports the decision below.

It is the law of New York that a converter is not exonerated because he proceeded in an honest but mistaken belief that the property was his own.

In *Boyce* v. *Brockway* (1865) 31 N. Y. 490, the Court said, per Davis, J. (p. 493):

> "The law on this subject is well settled. 'The proof,' says Brown, J., in *Cobb* v. *Dows* (9 Barb., 242), 'need not show a tortious taking, or that the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiffs' title, or under an honest but mistaken belief that the property was their own, they would still be liable to plaintiff if their acts in regard to it amount to a conversion. If they have taken it into their own hands, or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability to plaintiffs is established.' This exposition of the law is fully sustained by the authorities [Citing authorities].
>
> "A wrongful intent is not an essential element of the conversion. It is enough in this action that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it."

This continues to be the law in New York. *Pease* v. *Smith* (1875) 61 N. Y. 477; *Industrial & General Trust* v. *Tod* (1902) 170 N. Y. 233; *Koslow, Inc.* v. *Bletterman* (N. Y. Tr. T. 1960) 23 Misc. 2d 340.

A corporate director who participates in a conversion of another's property is not relieved of liability because he is acting on behalf of the corporation. *Mendelson* v. *Boettger* (2d Dept. 1939) 257 App. Div. 167, aff'd. no opinion 281 N. Y. 747; *McCrea* v. *McClenahan* (2d Dept. 1909) 131 App. Div. 247; *Melnick* v. *Sable* (2d Dept. 1960) 11 A. D. 2d 1075. This is true though the corporate representative is acting under a claim of right on behalf of the corporation. *Debobes* v. *Butterly* (1st Dept. 1924) 210 App. Div. 50. And even church trustees have been recently held personally liable for authorizing the removal of gravestones which they believed the church had the right to remove. *Conn* v. *Boylan* (Sp. T., Suffolk, 1962) 224 N. Y. S. 2d 823 (not officially reported).

The agent is not exonerated because he acts in good faith in the mistaken belief that the property converted belongs to his principal. *Spraights* v. *Hawley* (1868) 39 N. Y. 441; *Kachurin* v. *American Iraq Shipping Co.* (N. Y. Tr. T. 1946) 187 Misc. 178. In *Suzuki* v. *Small* (1st Dept. 1925) 214 App. Div. 541, aff'd. no opinion 243 N. Y. 590, the Court said by Burr, J. (p. 557):

> "The defendant, even though acting as agent and in entire good faith, is nevertheless liable for the conversion.
>
> "It has been held without exception that wrongful intent is not a necessary element of a conversion. Nor is the fact that the defendant was acting as an agent a defense at all."

Likewise, the representatives of a corporation who participate in the conversion are personally liable though their intentions are honest. In *Passaic Falls Throwing Company* v. *The Villeneuve-Pohl Corporation* (1st Dept. 1915) 169 App. Div. 727, the Court said, by Clarke, J. (p. 729):

> "So far as the defendants Pohl and Friedlander are concerned, as officers and agents of the defend-

> ant corporation, they participated in obtaining the possession of the property from the plaintiff and in converting it and the proceeds thereof to the use of the defendant. They were, therefore, joint feasors. Every person is liable who personally or by agent commits an act of conversion or who participates by instigating, aiding or assisting another. An agent or servant who converts the property of a third person is liable for such conversion, and it is no defense if his acts were committed in pursuance of his employment or for the benefit of his principal or master, though the servant or agent acted under a *bona fide* belief that his master or principal was the owner of the property and in ignorance of the true owner's rights, since one who interferes with personal property must at his peril see that he is protected by authority of the true owner.
>
> "The judgment was, therefore, rightly entered against Pohl and Friedlander."

There is thus no special immunity for officers or directors of a corporation.

Petitioners' reliance on *Santa Barbara* v. *Avallone & Miele, Inc.* (1936) 270 N. Y. 1, is misplaced. In that case, a customer had entrusted securities to a financial house to be forwarded to Rome for sale. The proceeds had been remitted and placed in the corporation's Lire Account in this country. They were then wrongfully transferred from that account to the Dollar Account. The ordinary expenses of the corporation were regularly paid from the latter, and plaintiff sought a recovery against Miele, an officer who, without knowledge of the wrong, had merely withdrawn moneys from the Dollar Account for the regular expenses of the corporation. He was held not liable.

The case is readily distinguishable. After pointing out that the liability of the corporation was not for conversion,

but as a trustee *de son tort*, the Court said, per Finch, J. (p. 6):

> "But Miele may be held liable as an active participant in this wrong of the corporation only if he participated as agent in the withdrawal of the money of the plaintiffs from the lire account, or had knowledge that the moneys of the plaintiffs in that account had been placed in the 'Dollar Account.' The findings do not show that Miele had knowledge that these moneys had gone into the 'Dollar Account,' nor is there any finding that Miele participated in the directions which transferred these moneys from the lire account to the 'Dollar Account.'"

Thus, the Court treated the transfer from the Lire to the Dollar Account as the tort. What the Court in effect said is that if Miele had participated in the transfer from the Lire to the Dollar Account he would have been liable as in the case of conversion. And if he had withdrawn the money from the Dollar Account with knowledge of the tort he would be liable as for a breach of trust.

It must be emphasized liability has been imposed upon petitioners here, not for failure to supervise or investigate the acts of others, but because of their personal participation in converting respondent's property and thereby causing injury.

It is now undisputed that the mortgage to the bank of property subject to the conditional sales contracts constituted a conversion. Petitioners all voted for the resolution authorizing the mortgage [Finding 14, a19] and petitioner Zeh, as president, and petitioner Krupski, as treasurer, made and executed it [Finding 13, a19]. This participation was sufficient to hold them liable under the law of New York, whether or not they acted mistakenly and in good faith.

POINT III.

The alleged conflict between panels of the same Court of Appeals is illusory and based upon a misreading of *Armour* v. *Celic*.

Despite the fact that the decisions (rendered but seven months apart) were unanimous and that Chief Judge Lumbard and Judge Moore participated in both, petitioners assert (p. 5) that certiorari ought to be granted because the *Aeroglide* decision "is in direct conflict with" the *Armour* decision.

Petitioners say (p. 7): "The *Armour* case subjects to liability only that director who is 'culpably implicated' in the acts which result in the conversion". Petitioners then argue that "culpable" means "criminal", "reckless", "gross".*

A more careful reading of the passage relied upon by petitioners and of its context will show that the Court of Appeals had no intention of relieving the *Armour* defendants from liability if upon the facts to be developed upon remand they were found to have participated in the conversion. The passage relied upon is as follows:**

> "Defendants' argument that conversion will not lie because money cannot be the proper subject of conversion requires little consideration. Although the action was cast in terms of conversion, the liability of the defendants need not be pitched on so narrow a ground. If, as we have found, the Cooperative tortiously misappropriated plaintiff's property by disbursing its monies to persons other

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* "Culpable" sometimes means no more than to be in breach of a legal duty. Black's Law Dictionary, p. 487 (3rd ed. 1944); and see *Noonan* v. *Luther* (3d Dept. 1907), 119 App. Div. 701, 703.

** *Armour and Company* v. *Celic* (2 C. A. 1961) 294 F. 2d 432, 438.

> than plaintiff and by exchanging its fertilizer for produce, then the defendants who are culpably implicated must be held accountable wholly apart from whether their action constitutes a technical conversion."

What the Court says is not that petitioners may be held liable for conversion only if they are "culpably implicated". What it does say is that if they are "culpably implicated" they must be held accountable wholly apart from whether their action constitutes a technical conversion.

The opinion nowhere suggests a rejection of New York law, which holds a participant in a conversion by the corporation liable irrespective of his good faith and mistaken impression that the property is the corporation's. Indeed, the *Armour* court proceeds to say that the *Armour* defendants will be liable if they "personally voted or otherwise participated in" the tort. For this it cites *Phelps Dodge Refining Corp.* v. *F. T. C.*, (2 C. A. 1943) 139 F. 2d 393. The *Armour* court then proceeds to give an example of a wholly different kind of liability. It says (p. 439):

> "And an officer who disburses funds from a corporation's general banking account in favor of third persons with knowledge that the corporation has deposited in the account funds of the plaintiff which it holds as agent or bailee is liable for plaintiff's loss."

For this the *Armour* court cites *Santa Barbara* v. *Pasquale Avallone & Stefano Miele*, (1936) 270 N. Y. 1. But as Judge Finch pointed out in *Avallone* (p. 6):

> "Even when the fund was depleted, the wrong done by the Avallone corporation would not constitute

> a common-law conversion but instead a breach of trust. If the defendant Miele had signed checks depleting this fund with knowledge that a trust might be impressed upon the fund, he might be said to have acted as agent of the Avallone corporation in committing such a breach, and he, as well as the Avallone corporation, could be held liable as a trustee *de son tort*."

The meaning of the *Armour* court now becomes clear. If the *Armour* defendants voted for, or otherwise participated in a conversion of the *Armour* fertilizer or in a diversion of its proceeds, they were liable. And if they depleted the corporation's general banking account by signing checks in favor of third persons with knowledge that the corporation had deposited funds of the plaintiff in the account they were also liable, not for a conversion, but for a breach of trust.

Plainly, there is no conflict with the decision in the present case. And even if there were, it would be beside the point, for the question is whether "... a court of appeals ... has decided an important state ... question in a way in conflict with applicable state ... law" (Rule 19 (1)(b)). That *Aeroglide* correctly states the law of New York is amply demonstrated by the cases cited in Point II above and by the inability of petitioners to cite a New York case which supports their contention. This being so, there is no ground for granting certiorari.

POINT IV.

The question posed does not fairly arise upon the record.

The question which petitioners ask this Court to consider is as follows:

> "May a corporate director be personally liable in tort for conversion by voting for certain corporate action when in so voting he relies upon the advice of the corporation's attorney, and its general manager and without knowledge that the action which he thereby authorized may harm the rights of another?"

Petitioners did not take the stand and there was no evidence that in their participation in the conversion they had relied upon the advice of the corporation's attorney, its general manager, or anyone else.

That petitioners were "without knowledge" is a broad assumption.

The parties entered into the following stipulation [R. A. 40-41]:

> "It is hereby stipulated and agreed that if the defendants were called each of them would testify that in December, 1956, and on February 6, 26 and 27, 1957 [dates of acts of conversion], he was unaware of the provision in Exhibits 2 through 12, reading as follows: 'Legal title to the equipment will remain in the seller until full payment as herein stipulated has been received by the seller. Buyer agrees to do anything necessary to see that title so remains in the seller.' "

If petitioners were not alert to the fact that the machinery they were mortgaging was under conditional

sales contract it must have been because they had forgotten that fact, and not that they had never known it.

In the case of the principal $61,000 contract*, the proposals, which were on respondent's standard contract forms containing the retention of title provisions, were mailed to the Cooperative [R. a30, R. b3a]. The directors discussed them before the May 23, 1956 meeting [R. b1a]. At this meeting a committee, consisting of petitioners Zeh, Krupski, Gillispie and one Prusinowski (now deceased) [R. a17] were chosen to visit respondent's plant in Raleigh and were "* * * given the power to sign the grader contracts * * *" [R. b1a].

The committee journeyed to Raleigh, bringing the proposals with them [R. a17, 31; R. b1a, 3a]. After an entire morning's negotiation [R. b1a-4a], the committee obtained a reduction in price, and an agreement from respondent that additional equipment could be ordered under the same price schedule and upon the same contract terms [R. b3a, 4a]. Numerous changes in the proposals were embodied in a letter dated May 28, 1956, and a contract was prepared for signature, consisting of the proposals, the amending letter and a front sheet, also on respondent's standard form (including the retention of title provision), and set forth the total price, now reduced to $61,000. Kelly, respondent's vice president (now president), and petitioner Zeh, then signed the contract on the front sheet [R. a17, 31; R. b2a, 3a]. The committee took the contract back with them [R. b4a].

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* Since the District Court found that the machinery sold from the principal contract was converted [R. a26] and had a value greater than the amount of the unpaid indebtedness at the time of conversion [R. a20], the fact that the orders for the supplemental contracts were put through by Manager Brangenberg rather than by petitioners loses significance.

At the directors' meeting of May 31, 1956, the Board upon petitioner Gillispie's report voted a one-third payment in accordance with the terms of the contract [R. b2a-3a].

The contract in its final form [Ex. 3] contained the retention of title provision at least fourteen times. The principal contract and the confirmations of the supplemental contracts remained in the files of Cooperative, available to petitioners and were produced at the trial by Cooperative's assignee for the benefit of creditors.

The circumstances are such that petitioners must have known of the retention of title provision. Of course, petitioners Zeh, Krupski and Gillispie had a somewhat greater exposure to the terms of the contract through their extensive negotiations at Raleigh.

Since Zeh signed the contract the law would impute knowledge to him of its contents even if he did not have that knowledge. *Pimpinello* v. *Swift & Co.* (1930) 253 N. Y. 159; *Matter of Stone* (1936) 272 N. Y. 121; *Amend* v. *Hurley* (1944) 293 N. Y. 587, 595; *Upton, Assignee* v. *Tribilcock* (1875) 91 U. S. 45.

Manifestly, petitioners cannot plead misapprehension resulting from their own negligence as a defense to the liability which they incurred for participating in the conversion of respondent's machinery.

Conclusion.

The question which petitioners ask this Court to decide is not fairly raised by the record. But if it were, it is a question of New York law which this Court will not ordi-

narily examine and which, moreover, is amply supported by New York precedents.

The petition for certiorari should be denied.

Dated: New York, N. Y.,
July 18, 1962.

Respectfully submitted,

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